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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 50.

VICTOR EMANUEL PEREIRA and
EUGENE H. BRADING,
Petitioners,

against

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONERS.

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
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Counsel for Petitioners.

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against

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONERS' BRIEF.

Opinions of Courts Below.

There was no opinion in the United States District Court for the Western District of Texas, El Paso Division.

The majority opinion of Rives, C. J., in the Court of Appeals for the Fifth Circuit is reported in *Pereira* v. *United States*, 202 F. 2d 830, and appears at pages 148-158 of the record.

The dissenting opinion of Hutcheson, Ch. J., is reported at 202 F. 2d 837 and appears at pages 158-159 of the record.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. 1254(1).

Certiorari was granted by this Court on June 15, 1953 (R. 164).

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Statement of the Case.

This Court has granted certiorari (R. 164) to review a judgment of the United States Court of Appeals for the Fifth Circuit (R. 160) which (Hutcheson, Ch. J., dissenting in part) affirmed a judgment of the United States District Court for the Western District of Texas, El Paso Division (R. 141) convicting the petitioners on three counts of an indictment (R. 141).

The indictment originally included eleven counts, eight of which were dismissed at the close of the trial on the Government's motion (R. 1-8, 109).

The petitioners were convicted under the first count (R. 1-2) of a charge of mail fraud (62 Stat. 763, 18 U. S. C. 1341); under the tenth count (R. 5-6) of a charge of violating the National Stolen Property Act (62 Stat. 806, 18 U. S. C. 2314); and under the eleventh count (R. 6) of a charge of conspiracy to commit the acts alleged in the first ten counts, including the eight which had been dismissed on the Government's motion (62 Stat. 701, 18 U. S. C. 371).

The First Count alleges that Brading and Pereira, the petitioners, "devised and intended to devise a scheme and artifice to defraud Mrs. Gertrude J. Joyce" by falsely representing that Pereira was obtaining a divorce in Denver, Colorado and was to receive $48,000 as a settlement; that he was a wealthy businessman; that he was a hotel man of wide experience and had an option to buy a certain hotel in Greenville, Texas; that it was a fine financial proposition and would earn a fine living for Mrs. Joyce and him; that he needed immediate cash for this purpose (R. 1); that Brading was a wealthy oil man and was to close an oil lease; that if Mrs. Joyce would lend Pereira $5,000 he would double his money; and that Pereira was

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violently in love with Mrs. Joyce (R. 2). It is alleged that Mrs. Joyce advanced $35,286.78 to Pereira and lent the defendants $5,000, and that she was induced to marry Pereira (R. 2). This count alleges that on June 15, 1951, for the purpose of executing the scheme, Pereira and Brading

> "caused to be placed in an authorized depository for mail matter a letter addressed to the Citizens National Trust & Savings Bank, Los Angeles, California, to be sent and delivered by the Post Office establishment of the United States" (R. 2).

The Tenth Count alleges that on the same date Pereira and Brading, with unlawful and fraudulent intent, caused to be transported in interstate commerce from El Paso to Los Angeles a check drawn by Fewel & Company on Citizens National Trust & Savings Bank payable to Mrs. Joyce in the amount of $35,286.78 (R. 5-6).

The Eleventh Count alleges that, commencing on or about April 19, 1951, Pereira and Brading conspired to commit the offenses set out in the first ten counts of the indictment (including the eight counts dismissed on the Government's motion at the close of the trial (R. 109)) and that pursuant to that conspiracy they performed each of the overt acts alleged in the preceding ten counts (including those dismissed); had a conversation with Mrs. Joyce and Kathryn Joyner in the Del Norte Hotel at El Paso; opened an account at the State National Bank in that city in the name of Pereira; and on June 15, 1951 caused Mrs. Joyce to endorse a check at the Del Norte Hotel (R. 6).

The single incident which is the asserted basis of Federal jurisdiction is the alleged mailing for collection by the State National Bank of El Paso, Texas, to the Citizens National Trust & Savings Bank of Los Angeles, California,

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of a check drawn on the Citizens Bank by Fewel & Company to the order of Gertrude J. Joyce (who was at that time the wife of the petitioner Pereira).

Although the fraud charged by the indictment was an ordinary scheme to obtain money by false pretenses, the single alleged mailing which was an adventitious consequence of the scheme and which was the basis of the conviction of the defendants has been punished by a maximum sentence, as to each of the petitioners, of five years on the mail fraud count, a concurrent maximum sentence of ten years on the stolen property count, and a cumulative sentence of two years on the conspiracy count (R. 143-144).

Testimony of Mrs. Joyce (Gertrude Joyce Pereira).

The Government's case rested largely—and its essential elements entirely—on the testimony of Gertrude J. Joyce who, during the greater part of the period to which the indictment refers, including the times of the principal material misrepresentations, of the mailing and of the consummation of the fraud, was the wife of the petitioner Pereira. She was by her own account fifty-five years old—at least ten years older than Pereira (R. 46)—and had been married twice before (R. 11, 53, 55). She was a woman of substantial means, and had various business and property interests (R. 55-56).

She testified that she and her half-sister, Kathryn Joyner, casually met the appellant Brading, known to them as Lee, on the steps of the Del Norte Hotel in El Paso, Texas (R. 11-12). Brading took them into the cocktail lounge of the hotel and introduced them to Pereira (R. 12). The four visited Juarez that evening and the next, having dinner and attending various night clubs (R. 13, 14). Pereira was already making love to Mrs. Joyce (R. 14).

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Within two days from the time when they first met, and at her suggestion (R. 42-43), she had invited Pereira and Brading to become house guests at her home in Roswell, New Mexico (R. 14). They accepted the invitation (R. 14).

Pereira told her that he was a hotel man from Denver, that he was getting a divorce there, and that he had given some hotels to his wife Ada as part of the divorce settlement (R. 50, 51). At Roswell, he received a telegram saying that his divorce would soon be granted and that he would soon receive $48,000 as his share of a property settlement (R. 15, 17).

Pereira and Brading had been talking about the oil business, and saying that when Pereira received his money he would go into that business with Brading (R. 15). Brading later told her that there were some leases on which they could double their money, but that Pereira would have to pass up the opportunity because his funds would not be available for a month (R. 15, 16). Pereira was not present (R. 16). Brading said that he himself was investing $2,000, and asked her to let Pereira have $5,000 (R. 16). She accordingly wrote out a check for $5,000 (R. 16).

She and Pereira visted El Paso several days later, staying there several days (R. 17). Pereira told her that Brading was going to meet him there to sign some leases (R. 17).

They visited Juarez again that night, drove back to Roswell and "had a good, gay time" (R. 17). She invited some friends to a birthday party in Pereira's honor (R. 17).

A few days later, at Pereira's suggestion that they "take a little trip together and become better acquainted," and at her expense, he and Mrs. Joyce took a trip to Wichita Falls, where they spent several days (R. 17-19). A letter she then wrote to Miss Joyner boasts of "loads of fun" and a severe hangover (G-2, R. 19-20). Brading joined them

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there for the weekend, and all three then drove to Dallas (R. 20) where they sojourned a few more days (R. 43-46). There they attended various parties in the company of a lady known as Red Snapper, "an old, old friend" of Mrs. Joyce (R. 57), and who completed the foursome (R. 58).

At all of these occasions Pereira and Mrs. Joyce stayed at hotels where, as the majority opinion in the Court of Appeals aptly put it, they observed the proprieties of registering in their own names for separate rooms (R. 44-45, 47, 151).

Pereira and Mrs. Joyce then went to Hot Springs for a few days, and there decided to get married in Kansas City (R. 23, 24). They proceeded to Kansas City, where their conduct was such as to give evidence of an extended course of immoderate drinking and to leave small doubt of the degree of their intimacy (R. 46-49).

Pereira had expressed the expectation of being able to buy a Cadillac (R. 22-23). Mrs. Joyce volunteered to lend him the money (R. 23-24).

Mrs. Joyce and Pereira were married in Kansas City on May 25, 1951 at a wedding attended by all of her friends in Kansas City and by Brading and Kathryn Joyner, who flew up for the ceremony (R. 25). All of them attended a cocktail party the next day at the home of her friends, who were "very prominent people in Kansas City" (R. 25). Shortly after the marriage she advanced the funds with which he purchased the Cadillac (R. 25-26).

Pereira told his wife, in Brading's presence, that he had telephoned Greenville, Texas and found out that he could buy a hotel there (R. 27-28). He suggested that they drive by Greenville and see it (R. 28). They visited the Washington Hotel at Greenville, and looked at it (R. 28, 29). Pereira and Brading discussed the question whether it would be advisable for Pereira to buy it, Brading saying

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that he did not know anything about the hotel business (R. 28).

In Dallas, Pereira had a private discussion with his wife about the hotel in Greenville (R. 29). He suggested that she go in with him on the investment, and said that he thought he could buy the hotel for $78,000 (R. 29). She offered to sell some securities for that purpose (R. 29). He said that he had a broker named E. J. Wilson whom he was going to see about the deal (R. 29). He went out and was gone all day, and returned saying that he had an option on the hotel (R. 29). The option was not offered or received in evidence, but she was permitted to testify as to its contents (R. 30).

On June 2, 1951, Mr. and Mrs. Pereira returned to Roswell and there attended a party or ball, because she "wanted everyone to meet" him (R. 30). On June 11th, he told her that he had called Wilson's office about an extension of the option (R. 31), and later told her that he had received a telegram signed in the name of Wilson extending the option (R. 31).

Mrs. Pereira, after directing the sale of certain securities, received as the proceeds of the sale a check of Fewel & Company, her brokers, for $35,286.78, drawn on the Citizens National Trust & Savings Bank of Los Angeles (R. 31, G-4, R. 33). She and Pereira went to El Paso to deposit the money because he had an account at the State National Bank there, and because she

> "... decided I did not want everybody in Roswell to know about this deal" (R. 31).

A few days later Pereira told her that Brading wanted him to drive to a little town in Texas to pick up some oil leases (R. 34). On the morning of June 15, 1951 Brading and Pereira departed (R. 34-35), and she did not see them again until the trial (R. 36).

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She was divorced from Pereira on June 16, 1951 (R. 10), more than a month after the date of the indictment (R. 1) and less than two months before the trial (R. 8).

Other Testimony.

Miss Kathryn Joyner corroborated her half-sister's testimony as to the circumstances under which they first met Brading and then Pereira (R. 62-65). For the rest, she merely testified that Pereira had mentioned receiving a telegram about his divorce and a $48,000 settlement, that the four had stopped at Greenville on the way from Kansas City to Dallas after the wedding, and that Pereira had said he had looked at the hotel to lease (R. 64-65). She testified that Mrs. Pereira never said anything to her about these financial transactions with her husband (R. 65).

The Clerks of the Denver courts having divorce jurisdiction testified that there was no divorce case there in 1951 or during several preceding years to which Pereira was a party (R. 65-66, 75-76).

The lessee of the Washington Hotel at Greenville and a representative of the owner of the hotel denied knowledge of any option to Pereira, but the lessee testified that there had been a considerable amount of activity by interested persons looking generally toward the purchase of the fee ownership as well as the lease (R. 69-70, 77-81). The hotel had been listed for sale (R. 80). The lessee also testified that he had discussed with a broker the possibility of a transfer of the lease (R. 78-80, 81-82), and that although he was approached about the possibility of selling the lease he could not do so without the consent of the owners (R. 78-79) and of his partner (R. 81).

A friend of Mrs. Joyce residing at Ruidosa, New Mexico (R. 84) testified that Mr. and Mrs. Pereira were her guests at a dinner party in June; and that Pereira expressed love

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for his wife, stated that he had owned several second rate hotels, and said that he had to fly back to Greenville to take up an option on a hotel there (R. 84-86). Brading was not present at this time (R. 87).

There was evidence that a telegram was sent from Fort Worth to Pereira in Roswell on June 13th (G-12, R. 83) purporting to authorize a seven-day extension of an option by E. J. Wilson (R. 82). The proprietor of a telephone answering service in Fort Worth testified that Brading was a customer of his service at this time, and was known to him as E. J. Wilson (R. 107-108).

There was also testimony that on the afternoon of June 20th Pereira, accompanied by a woman, registered as "Victor Perry" at a hotel in Oklahoma City (R. 88-92).

There was no direct testimony as to the deposit in any mail depository of the check of Fewel & Company in the amount of $35,286.78 (G-4, 33) and its transmission by mail to the Citizens National Trust & Savings Bank for collection. An officer of the State National Bank at Dallas testified that, according to the bank's records, the check was entered for collection and sent by mail to the Citizens National Bank with instructions to "wire fate", wire advice of payment was later received, and payment made to Pereira (R. 95-99). A clerk of the bank testified that the check was deposited for collection and sent to California, and the alleged proceeds paid to Pereira, but it is apparent that his testimony as to the alleged mailing was also based on the records of the bank rather than being first-hand (R. 104-105).

There was evidence that a telegram sent on April 24, 1951 from Denver, signed "Curtis" and addressed to Pereira at Roswell, giving a purported net figure of a property settlement as $48,895 (G-10, R. 68, 66-67) was sent by a friend of Pereira named Gibson after receiving the

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text from Pereira in the form of a written message in his handwriting (R. 70-75).

The defendants did not testify or offer evidence in their own behalf, but rested at the end of the Government's case (R. 109).

* * *

After dismissal of eight counts charging mail fraud, the jury convicted the petitioners of the charge of mail fraud under the first count, of transporting stolen property under the tenth count, and conspiracy under the eleventh count (R. 141). The sentence of the Court was the maximum confinement under Count One, five years; the maximum confinement under Count Ten, ten years, to run concurrently; and a cumulative sentence of two years under Count Eleven (R. 143-145).

The Court of Appeals affirmed the judgment, Hutcheson, Ch. J., dissenting in part (R. 160). The Court held that the testimony of Mrs. Pereira (now once more Mrs. Joyce) was in general admissible against her husband by reason of the divorce prior to the trial. It held, moreover, that the petitioner Pereira could not assert his privilege against the disclosure of confidential matrimonial communications made to his wife during the marriage, because as far as he was concerned the marriage was a mere "sham and pretense". The Court held that when the check of $35,286.78 received by Mrs. Pereira from her brokers and endorsed by her to him was mailed for collection by the El Paso bank to the Los Angeles bank on which it had been drawn, that mailing constituted the mailing referred to in the first count, the interstate transportation of a security obtained by fraud as charged in the tenth count, and the culmination of the conspiracy charged in the eleventh (R. 148-158).

Hutcheson, Ch. J., concurred in the affirmance as to both petitioners on Count One, the mail fraud count, and as to

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Pereira on Count Ten, the transportation count. He dissented as to Brading on Count Ten because proof that Brading caused the transportation was wholly lacking. He also dissented as to both petitioners on Count Eleven, the conspiracy count, on the ground that conviction as to that count and the cumulative sentence amounted to double jeopardy; and on the further ground that, following *United States* v. *Crimmins*, 123 F. 2d 271 (C. C. A. 2d), the fact that a jury might have found the petitioners guilty of the substantive offense did not authorize a conviction of the conspiracy (R. 158-159).

Specification of Errors.

1. The Court of Appeals erred in holding that the wife of a defendant in a criminal case may testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals.

2. The Court erred also in holding that the matrimonial privilege against disclosure of confidential communications may be rejected on the ground that the marriage is "sham", and such communications disclosed, in a case where the marriage was undoubtedly valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited as man and wife but so held themselves out to the world.

3. The Court erred, further, in holding that when an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a con-

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spiracy, conviction of the conspiracy count followed by a cumulative sentence on that count does not amount to double jeopardy.

4. The Court erred in holding that there may be a conviction of conspiracy to use the mails to defraud and to transport stolen property across State lines in the absence of evidence of any agreement to do so.

5. The Court erred in holding that the boundaries of Federal criminal jurisdiction may be extended into the proper domain of local law enforcement authorities in order to deal with transactions amounting to ordinary larceny by fraud, through interpretation of the mail fraud and stolen property statutes, where the jurisdictional facts, the use of the mails and the transportation in interstate commerce, are not proved.

Statutes Involved.

62 Stat. 763, 18 U. S. C. 1341 (Mail Fraud):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

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62 Stat. 806, 18 U. S. C. 2314 (National Stolen Property Act):

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . .

62 Stat. 701, 18 U. S. C. 371 (Conspiracy):

If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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ARGUMENT.

Summary of the Argument.

Point I. Under Rule 26 of the Rules of Criminal Procedure and the decisions of this Court, the wife of a defendant in a criminal case may not testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals. The matrimonial privilege against disclosure of confidential communications may not be rejected on the ground that the marriage is "sham" when the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited but held themselves out as man and wife.

Point II. When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, conviction on the conspiracy count, followed by a cumulative sentence, amounts to double jeopardy.

Point III. In the absence of evidence of any agreement to use the mails to defraud or to transport stolen property across State lines, a count charging conspiracy to commit those offenses must fall.

Point IV. The conviction of the petitioners of the substantive offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of Federal criminal jurisdiction into the proper domain of local law enforcement authorities.

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POINT I.

Under Rule 26 of the Rules of Criminal Procedure and the decisions of this Court, the wife of a defendant in a criminal case may not testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals. The matrimonial privilege against disclosure of confidential communications may not be rejected on the ground that the marriage is "sham" when the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited but held themselves out as man and wife.

The evidence which, in the view of the Government, shows that the delivery by Mrs. Pereira of the check of Fewel & Company to her husband was obtained by fraud, was principally her own testimony. At the time of the principal material misrepresentations as to which she testified, and of the alleged consummation of the fraud and the mailing, she was the wife of the petitioner Pereira. They were married on May 25, 1951 (R. 10), and the alleged operative facts as to which she testified occurred thereafter during May and June (R. 29-63). They were not divorced until November 16, 1951 (R. 10), more than a month after the date of the indictment (R. 1) and less than two months before the trial (R. 8).

Under continuing objection on the ground that her testimony related to confidential communications between husband and wife (R. 10, 28, 29, 32, 36), she testified to the following alleged conversations and events, among others:

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She sold some securities in California and obtained from her brokers, Fewel & Company, a check for $6,956.55 (R. 25-26, G-3). She gave her husband this check when a Cadillac automobile which he was purchasing was ready for delivery (R. 25-26). He stated that the car would cost $4,750 (R. 26). She told him that she wanted the rest of the money returned to her, and he replied that they would settle all that later (R. 26). He kept the money and did not return it to her (R. 26).

Over the same objection, which was explicitly reiterated (R. 29), she was permitted to relate the following conversation: Pereira said that if she wanted to go in with him on the investment, he could buy the Washington Hotel for $78,000 (R. 29). She told him that she had some securities she could sell, on which she was not making a large return (R. 29). She said that she knew that he was capable and she trusted him; and she offered to sell the securities (R. 29). When she was unable to reach her brokers by telephone, he suggested that she telephone them when they returned home (R. 29). He said that he had a broker named E. J. Wilson in Fort Worth, whom he was going to see about this deal, and that he had not really made up his mind about it until she said she would put up the money (R. 29). When Pereira returned after an absence he reported that they had obtained the hotel "for a song"; that there was an old man running it for years who wanted to get rid of it; that it was a wonderful deal, and that he had an option on it (R. 29).

Over the same objection, she was permitted to testify that her husband went to Fort Worth to see about the hotel, told her that he had obtained an option on it and that he had paid $2,500 down, and produced a purported option (R. 30). He told her that he had telephoned his lawyer and obtained $2,500, which he had used to make the down payment (R. 30). About June 15, her husband told her that

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he had telephoned Wilson's secretary, and received a telegram granting an extension of the option (R. 30-31). When the check from Fewel & Company arrived, they discussed their affairs and decided that they would bank the money in El Paso because she didn't want everybody in Roswell, her home town, to know about the deal (R. 31). Pereira told her that he was going to El Paso to sign some papers in liquidation of his prior divorce, and for which money was waiting for him in El Paso (R. 32). She delivered and indorsed the check to him (R. 32). On June 18, 1951, Pereira told her that he was going to leave early next morning and be back early that afternoon, and that he would pay her what he owed her the next day (R. 34-35).

Rule 26 of the Federal Rules of Criminal Procedure provides in part:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

We assume that the divorce, although it occurred after the date of the indictment and shortly before the trial, rendered Mrs. Pereira competent to testify against her former husband. 8 WIGMORE, EVIDENCE, Sec. 2237. But the husband's privilege against disclosure of confidential communications by him to his wife, which is the privilege here asserted by Pereira, is quite distinct from the general privilege excluding the testimony of one spouse against the other. *Wolfle* v. *United States*, 291 U. S. 7, 13-14. It is settled that the special marital privilege against the disclosure of confidential communications, as distinguished from the general privilege prohibiting testimony by one spouse against another, survives a divorce.

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8 WIGMORE, EVIDENCE, Sec. 2341(2);
United States v. *Mitchell,* 137 F. 2d 1006 (C. C. A. 2d);
United States v. *Walker,* 176 F. 2d 564 (C. A. 2d), *cert. den.* 338 U. S. 891.

In *Bassett* v. *United States,* 137 U. S. 496, in reversing a conviction for polygamy on the ground that the testimony of the lawful wife as to disclosures by her husband of his second marriage was improperly permitted, this Court sustained the following single assignment of error (see 137 U. S. at 497):

> "The District Court erred in permitting Mrs. Sarah Bassett, the former legal [i. e. the first] wife of the plaintiff in error, against his objection, to testify to a confidential communication made to her by him, while they were husband and wife, and not in the presence of any other person."

Brewer, J., speaking for the Court (at 505) quoted from *Stein* v. *Bowman,* 13 Pet. (38 U. S.) 209, 222, in which Mr. Justice McLean said:

> "It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to incriminate her husband, *or to disclose that which she has learned from him in their confidential intercourse.*" (Italics supplied.)

Bassett v. *United States* was decided under statutes which were, like Rule 26, declaratory of the common law. (See 137 U. S. at 504; 2 WIGMORE, EVIDENCE, Sec. 488, p. 574; *Overton* v. *State,* 43 Tex. 616, 618-9.) The opinion of this Court in the *Bassett* case was clearly based upon the common law privilege against the disclosure of confidential marital communications. As recently as *Blau* v. *United*

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States, 340 U. S. 332, 333-334, the Court reaffirmed that it had "no doubt" as to the privilege. See also *United States* v. *Walker,* 176 F. 2d 564, 567 (C. A. 2d), *cert. den.* 338 U. S. 891.

Assuming that the privilege against the disclosure of confidential marital communications is limited, like the privilege against anti-marital testimony, to exclude cases where the alleged injury is to the wife's person or her morals (8 WIGMORE, EVIDENCE, Sec. 2338), this is clearly not such a case as falls within that narrow exception. It does not involve any offense against her person or subjection of her to any moral degradation such as appears in the Mann Act cases. See *Shores* v. *United States,* 174 F. 2d 838 (C. A. 8th); *United States* v. *Mitchell,* 137 F. 2d 1006 (C. C. A. 2d). By the great weight of authority as well as on principle, offenses against the wife's property do not come within the exception. *Overton* v. *State,* 43 Tex. 616, 618; *People* v. *Ernst,* 306 Ill. 452, 138 N. E. 116; Note (1950) 98 U. of Pa. L. Rev. 719, 726; *cf. Hopkins* v. *Grimshaw,* 165 U. S. 342.*

The observation in *Blau* v. *United States,* 340 U. S. 332, 333, that marital communications are "presumptively confidential" means simply that they are deemed to be confidential unless the contrary is proved. 8 WIGMORE, EVIDENCE, Sec. 2336, cited at 340 U. S. 332, 333. These conversations and communications occurred between husband and wife in private, and neither in the presence of nor through any other person. There is no evidence that they were intended for transmission to others, or that they were not intended to be confidential; indeed, the reverse is the case.

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* Acts or transactions as well as conversations fall within the scope of the privilege. *People* v. *Daghita,* 299 N. Y. 194, 86 N. E. 2d 172; *Menafee* v. *Commonwealth,* 189 Va. 900, 55 S. E. 2d 9; Annot. 10 A. L. R. 2d 1389; see 8 WIGMORE EVIDENCE, Sec. 2337.

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That all of these conferences and communications were confidential and were intended to be so is shown by all the surrounding circumstances: Mrs. Pereira disclosed nothing of them to Miss Joyner, her half sister (R. 65) and explicitly said that she wanted her to know nothing about them (R. 59). She asked that Pereira refrain from discussing them with Brading (R. 58-59). She insisted that she did not want people in Roswell to know about these transactions (R. 31, 58); indeed, this was the reason why, at her suggestion, the check from Fewel & Company was deposited in the bank in El Paso rather than at Roswell (R. 31).

The Court of Appeals appeared to recognize that the communications and conversations which are the basis of the Government's case were confidential and privileged, saying:

> "... Her competency to testify to any communications between husband and wife which were confidential and privileged remained unaffected by the divorce. [Citing authorities]" (R. 153).

The Court held, however, that "insofar as the defendant Pereira was concerned" the marriage relation was merely a sham used as a means to perpetrate a fraud, and that the privilege against disclosure of confidential communications was not available to him (R. 153).

This was error. There is no question that the marriage was valid as between the parties; indeed, the divorce was a conclusive adjudication to that effect. 2 FREEMAN, JUDGMENTS (5th ed. 1925) Sec. 906; see *Williams* v. *North Carolina,* 325 U. S. 226, 232. There was no express or implied reservation by either party. The marriage was consummated, they cohabited as man and wife, and they held themselves out to the world as married. They agreed,

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without reservation, to marry (R. 23-24). The wedding ceremony in Kansas City was attended by all of the bride's friends residing there, "very prominent people in Kansas City" (R. 24-25), and the bride and groom attended a cocktail party in their honor at the home of some of them (R. 25). They attended a ball at Roswell, where she "wanted everyone to meet" Pereira (R. 30). They lived at Roswell as husband and wife (R. 30-40). Pereira paid by his own check such expenses as the salary of the man-servant at her home (G-7, R. 40, 38) and her doctor's bill (G-8, R. 40, 38). Mail addressed to her as "Mrs. Gertrude Joyce Pereira" was delivered (G-5, R. 36-37). They dealt as husband and wife with an automobile dealer who sold them a Cadillac (R. 48, 72). They visited friends as husband and wife (R. 32-33, 38, 84-85).

In *Lutwak* v. *United States,* 344 U. S. 604, in which this Court held that the wives of the defendants were competent witnesses against their husbands, and by inference free from the privilege against disclosure of marital communications, the marriage ceremonies were indeed sham, being entered into under explicit agreements that the ceremonies were to be of no effect. The parties never cohabited as spouses, and never intended to do so; and the marriages were properly held to be void *ab initio* (344 U. S. at 613-615). The case at bar, however, is more than even a "limited purpose" marriage, to which this Court referred as presenting a different problem (344 U. S. at 612).

The authorities cited by the Court of Appeals (R. 284-285) as avoiding the privilege against confidential communications in this case are not in point. Indeed, that Court has misread 8 WIGMORE, EVIDENCE, Sec. 2230, n. 3. The passage cited, referring to the privilege against anti-marital testimony, says that the benefits of the privilege

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> ". . . are gained by the ingenious wrongdoer who brings himself within its formal terms by marrying the witness *after service of subpoena* and thus creating 'ad hoc' a domestic peace which is to be jealously safeguarded." (Italics in original.)

It is clear that the Court of Appeals has simply misread this passage as saying "are *not* gained", and thus innocently reversed its meaning. The actual text supports the petitioners' contentions. In the *Lutwak* case this Court recognized the validity, for the present purpose, of a marriage entered into in order to render the wife incompetent as a witness. 344 U. S. at 612.

Clark v. *United States*, 289 U. S. 1, 14, cited by the Court of Appeals, did not involve the marital privilege, but concerned the "inveterate but vague tradition" (289 U. S. at 13) against a juror's testifying regarding the jury's deliberations. The importance of that "privilege" cannot be compared with that of the privilege against disclosure of marital confidential communications, in weighing the social values for and against its refusal.

The Government will argue, citing *United States* v. *Graham*, 87 F. Supp. 237 (E. D. Mich.),* that one who has wrecked his marriage by perpetrating a fraud against his wife should not escape punishment by asserting his marital status as a means of suppressing what is likely to be—as in this case it is—the only available proof of the vital elements of the offense.

That argument begs the question, and overlooks the reason for the privilege. The rule of privilege arising out of certain personal relationships deliberately suppresses evidence in a particular case for the purpose of protecting

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* The question of confidential communications was not actually presented in the *Graham* case since the Court there found that no confidential communications were involved. See 87 F. Supp. at 238.

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the integrity of the social institution exemplified by that relationship, because the protection of the social institution is deemed a greater good in the long run than the disclosure of truth in one case. 8 WIGMORE, EVIDENCE Sec. 2336. The priest is forbidden to testify because preservation of the secrecy of the confessional is deemed a greater good in the long run than disclosure of the truth in the particular case; the physician is forbidden to testify because the healing of disease as facilitated by the patient's full confidence is deemed a greater good in the long run than disclosure of the truth in one case; the attorney is forbidden to testify because the need of society for his effective advice to his client is deemed a greater good in the long run than punishment for a particular offense. As this Court said in *Wolfle* v. *United States*, 291 U. S. 7, 14, through Mr. Justice Stone:

> "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."

A defendant in a criminal case invokes in his own behalf the privilege against disclosure of confidential communications between him and his spouse. When the Court grants that privilege it does so not for his sake but for the sake of the others, and for the preservation and strengthening of marriage as a social institution.

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POINT II.

When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, conviction on the conspiracy count, followed by a cumulative sentence, amounts to double jeopardy.

Hutcheson, Ch. J., dissented from the decision of the Court of Appeals sustaining the conviction on the eleventh count, which charged a conspiracy to commit the offenses charged in the first ten substantive counts. The second to ninth counts inclusive, which all charged a scheme to commit mail fraud, were dismissed on the Government's motion (R. 109). In his dissent Hutcheson, Ch. J., said (R. 159):

> "I am in no doubt that as a general rule a conspiracy count and a substantive count cannot be said to charge the same offense so that one excludes the other. I am equally in no doubt, however, that where, as here, the indictment merely charges that the conspiracy was to commit the same offenses charged in the substantive counts, a conviction on two of those counts and a dismissal of all the others, followed by a conviction and cumulative sentence on the conspiracy count, is to run a good principle into the ground, and make double jeopardy of the conspiracy count and the sentence on it."

This Court has recognized that the conspiracy statute is being much abused, and has been carried beyond the theory which supposes a serious and substantially continued group scheme for cooperative law breaking; and that the joinder of conspiracy and substantive counts

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especially is being used arbitrarily and harshly. *Pinkerton* v. *United States,* 328 U. S. 640, 644, n. 4.

In determining whether the joinder of the conspiracy count with the substantive counts amounts to double jeopardy within the meaning of the Fifth Amendment to the Constitution,

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States,* 284 U. S. 299, 304.

Each of the substantive counts alleges that the two petitioners joined in a scheme to commit the acts which the conspiracy count charges them with conspiring to commit (R. 1-6). Under the terms of this indictment it is plain that, as this Court said in *Pinkerton* v. *United States,* 328 U. S. 640, 644:

> "A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy."

It has accordingly long been settled law that the rules of evidence applicable in such a case are the same as those where a conspiracy is charged.

Blue v. *United States,* 138 F. 2d 351, 358 (C. C. A. 6th), *cert. den.* 322 U. S. 736-737;
Robinson v. *United States,* 33 F. 2d 238 (C. C. A. 9th);
Van Riper v. *United States,* 13 F. 2d 961 (C. C. A. 2d).

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It has also long been settled that, just as where a conspiracy is charged, the act of each participant in furtherance of the common scheme is deemed the act of all.

Blue v. *United States,* 138 F. 2d 351, 358 (C. C. A. 6th) *cert. den.* 322 U. S. 736-737;
Davis v. *United States,* 12 F. 2d 253 (C. C. A. 5th), *cert. den.* 271 U. S. 688.

The scheme thus charged in the Eleventh Count is precisely the same as that charged in the substantive counts. By its terms it alleges that the petitioners (R. 6)

> "... unlawfully and knowingly conspired to commit the various offenses against the United States which are fully described and set out in the first ten counts of this indictment ..."

As this Court held in *Braverman* v. *United States,* 317 U. S. 49, such an indictment, taken as a whole, charges only one offense and may be the basis of only one punishment:

> "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one" (317 U. S. at 53).

See also:

Sealfon v. *United States,* 332 U. S. 575;
Krench v. *United States,* 42 F. 2d 354, 356 (C. C. A. 6th).

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POINT III.

In the absence of evidence of any agreement to use the mails to defraud or to transport stolen property across State lines, a count charging conspiracy to commit those offenses must fall.

In dissenting from the conviction of the petitioners on the Eleventh Count, charging a conspiracy (R. 6) to "commit the various offenses . . . which are fully described and set out in the first ten counts," Hutcheson, Ch. J. said (R. 159):

> "I dissent from the conviction on this count further on the ground fully discussed in *United States* v. *Crimmins,* 123 F. 2d 271, that it does not follow, because a jury might have found the defendants guilty of the substantive offense, that they were justified in finding them guilty of a conspiracy to commit it.
>
> "In this case, while it was not necessary to prove, under the substantive offenses, that the parties agreed in advance to use the mails and transport stolen securities, it was necessary in proving the conspiracy count to prove that they did so agree.
>
> "While, therefore, in this case, I think the evidence is sufficient as to both defendants to show a violation of substantive count one and the use of the mails in carrying out the scheme, I do not believe that the evidence is sufficient to show that the parties entered into a conspiracy, that is agreed to use the mails under the first count or transport securities under the tenth."

There is no evidence that the petitioners agreed to use the mails to carry out a scheme to defraud, and there is no evidence that they agreed to transport stolen property across State lines. A conspiracy to use the mails to effect

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a scheme to defraud can be proved only by proof of all of the elements of that offense, including an agreement to use the mails for that purpose. *United States* v. *Cohen,* 145 F. 2d 82 (C. C. A. 2d), *cert. den.* 323 U. S. 799, 800; *Mazurosky* v. *United States,* 100 F. 2d 958 (C. C. A. 9th). Similarly, a conspiracy to transport stolen property in interstate commerce requires proof that the parties agreed to transport the stolen property across state lines. *United States* v. *Crimmins,* 123 F. 2d 271 (C. A. 2d); *Cf. Fulbright* v. *United States,* 91 F. 2d 210 (C. C. A. 8th).

As the Second Circuit said in *United States* v. *Crimmins,* 123 F. 2d 271, 273, per Learned Hand, J., in reversing a conviction of conspiracy to transport stolen securities:

> "Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding [citing cases]."

As Hutcheson, Ch. J., pointed out (R. 159), there was no evidence that Brading agreed to transport or caused to be transported the check in question and therefore no basis for his conviction of the offense of conspiracy. *Gable* v. *United States,* 84 F. 2d 929 (C. C. A. 7th); *Langer* v. *United States,* 76 F. 2d 817 (C. C. A. 8th). In the absence of such an agreement by Brading, we are left with the impossible proposition that Pereira conspired with himself. There is thus no ground for the conviction on the conspiracy count of either of the petitioners.

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POINT IV.

The conviction of the petitioners of the substantive offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of Federal criminal jurisdiction into the proper domain of local law enforcement authorities.

The verdict in a criminal case can be sustained only when there is

> ". . . relevant evidence from which the jury may properly find or infer, beyond a reasonable doubt"

every element of the offense with which the accused is charged. *Mortensen* v. *United States,* 322 U. S. 369, 374.

It is well established that the jurisdictional fact of the mailing is the gist of the offense of using the mails to defraud, and must be proved by competent evidence in order to sustain a substantive count charging that offense. *Rosenberg* v. *United States,* 120 F. 2d 935 (C. C. A. 10th); *Whealton* v. *United States,* 113 F. 2d 710 (C. C. A. 3d); *United States* v. *Baker,* 50 F. 2d 122 (C. C. A. 2d). The mailing may of course be proved in appropriate fashion by circumstantial evidence or by reference to an established customary mailing procedure. *Decker* v. *United States,* 140 F. 2d 378 (C. A. 4th), *cert. den.* 321 U. S. 792.

The same considerations necessarily apply to a substantive charge of transporting stolen property by means of the mails; the interstate transportation is the gist of the offense. *United States* v. *Handler,* 142 F. 2d 351 (C. C. A. 2d), *cert. den.* 323 U. S. 741; *United States* v. *Sheridan,* 329 U. S. 379, 386-390.

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The evidence in support of the mailing was largely the testimony of Uhlig, a vice-president of the State National Bank of El Paso, Texas, with which Pereira deposited the check for collection (R. 94-100). Uhlig had no personal knowledge of the transaction (R. 99). His testimony that the mailing occurred was merely his interpretation of unidentified records which were not introduced in evidence, and pencil memoranda or copies of at least some of those records (R. 96, 98-99). He testified that there was a letter of transmittal, but no letter of transmittal was introduced in evidence (R. 99), nor was there any evidence of any customary practice of mailing to support his testimony about the bank's records in order to establish a basis for admission of the letter of transmittal if it had been offered in evidence.

A ledger sheet purporting to report the deposits into and withdrawals from Pereira's account with the bank was introduced in evidence (G-14, R. 95-96), but it contains no reference to the check for $35,286.01 which is the subject of the three counts on which the defendants were convicted (G-4, R. 33).

There was testimony about a wired advice of payment received from Citizens National Bank, but no such document was offered in evidence (R. 98, 99). The only evidence on this subject, as on the mailing itself, was Uhlig's testimony as to records or copies of records not introduced in evidence (R. 99-100).

The only other testimony relating to the alleged mailing was that of Foster, a bank clerk at the State National Bank (R. 104-106). He testified that he sent the check to Los Angeles for collection (R. 104), but it is clear that he also was testifying on the basis of records not introduced in evidence (R. 104-105); the questions which elicited his answers repeatedly referred to such records (R. 105). Examination of all of his testimony shows that he was

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testifying to no more than the ordinary performance of the duties of his position as clerk, and that his reference to the alleged mailing was no more than an inference. He did not testify, nor was there any other testimony, that on a specified date he or any other person deposited the check in any specified mail depository at any specified time. There was thus no first-hand testimony as to mailing. The bank's records themselves as to the alleged mailing were not introduced in evidence, nor was there any evidence of any customary practice of mailing to support them. Nor was there testimony by any officer of Fewel & Company, the recipients, that the check was actually received through the mails—testimony which would have amounted to circumstantial evidence of mailing. *Cf. Stokes* v. *United States,* 157 U. S. 187; *Greenbaum* v. *United States,* 80 F. 2d 113 (C. C. A. 9th). Common law evidence of the fact of the mailing—the vital jurisdictional fact on which the conviction of the defendants under Counts One and Ten rested—was entirely absent.

The evidence was thus insufficient to prove that the mails were used. *Mackett* v. *United States,* 90 F. 2d 462 (C. C. A. 7th); *United States* v. *Baker,* 50 F. 2d 122 (C. C. A. 2d); *Brady* v. *United States,* 24 F. 2d 399 (C. C. A. 8th). The question was appropriately reserved by the petitioners' motion for acquittal for failure of proof (R. 114-115, Pars. I, III, VI).

• • •

The transactions which are the subject of this case amounted at most to no more than a typical common law fraud constituting larceny by trick. The loan of $5,000 which Brading obtained for Pereira from Mrs. Pereira by means of alleged false representations, and of which much is made in the indictment (R. 1-6) and the Government's case

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(R. 15-17) had nothing to do with the mails or interstate commerce at all. The alleged mailing of the Fewel & Company check was no more than a by-product, rather than an element, of the scheme.

Federal jurisdiction has here been extended into a field which is the proper realm of local law enforcement authorities, and in which there is no reason to believe they are not performing their duty. The protection of the Federal system of law enforcement from the imposition on it of such matters of properly local concern requires that, at the very least, the jurisdictional fact of the mailing be proved by proper common law proof as Rule 26 of the Rules of Criminal Procedure requires. Defendants in a criminal case, no matter how plain their guilt may seem to the Court, are entitled to be dealt with according to law:

> "In view of the Government's insistence that there is abundant evidence . . . it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." *Bollenbach* v. *United States,* 326 U. S. 607, 614.

Conclusion.

The testimony of the former wife of the defendant Pereira was erroneously admitted as to confidential communications during the marriage. Count Eleven of the indictment subjected the defendants to double jeopardy in view of the allegations of Counts One and Ten. There was no evidence of any agreement to use the mails to defraud or to transport stolen property across state lines, and the charge of conspiracy in Count Eleven must therefore fall. The conviction of the offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of federal criminal jurisdiction into the proper domain of law enforcement authorities. The judgment of conviction should therefore be reversed.

Dated: September 28, 1953.

Respectfully submitted,

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